

The Appeals Board has adopted the stipulations listed in the Decision. Additionally, the Appeals Board has adopted the parties' stipulations filed June 10, 1999, and June 15, 1999.

ISSUES

The only issue on appeal is the amount of temporary partial disability owed claimant for the period claimant worked on light duty after his injury for the respondent.

The Administrative Law Judge found claimant was entitled to temporary partial disability compensation in the total sum of \$499.11. But claimant contends he is entitled to temporary partial disability compensation in the sum of \$5,161.72. The claimant argues the statute that provides for the method of determining weekly temporary partial disability compensation is clear and unambiguous. Claimant is entitled to temporary partial disability compensation based on $66\frac{2}{3}$ percent of the difference between his pre-injury gross average weekly wage and his post-injury actual earnings subject to the maximum compensation rate.¹

In contrast, respondent contends the Appeals Board should affirm the Administrative Law Judge's Decision. First, the respondent argues, if the claimant has post-injury actual weekly earnings that either equal or exceed the maximum weekly compensation rate, then claimant is not entitled to temporary partial disability compensation. Second, if the Appeals Board does not agree with the foregoing argument, the respondent contends claimant's gross average weekly wage should be reduced by 10 percent in determining claimant's entitlement to temporary partial disability compensation because respondent is required to only return claimant to a job earning 90 percent of his gross average weekly wage. Third, respondent contends it should be allowed to withdraw its stipulation to the \$618.58 pre-injury gross average weekly wage. Respondent argues the gross average weekly wage amount included vacation pay and, if vacation pay is not included in claimant's post-injury actual earnings, then vacation pay should not be included in claimant's pre-injury gross average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds the Decision should be modified.

Claimant injured his low back on April 20, 1998, while working for the respondent. The treating physician returned claimant to light duty, and respondent accommodated claimant in a light duty job. Claimant worked on light duty until he was released with permanent restrictions after the pay period ending March 21, 1999.

One of the parties' stipulations filed on June 10, 1999, described the temporary partial disability compensation issue as follows:

¹See K.S.A. 1997 Supp. 44-510e(a).

The claimant and respondent had been unable to agree as to whether the claimant is entitled to temporary partial disability compensation from the date of his accident of April 20, 1998 through the date of his release on March 21, 1999; therefore, the parties stipulate that the issue of whether the claimant is entitled to temporary partial disability compensation will be submitted to the court. The parties further stipulate and agree that all rights and defense[s that are] available as to the issue of temporary partial disability compensation shall not be prejudice[d] or waived by [the parties] entering into this [s]tipulation.

An injured worker is temporarily and partially disabled at the time the treating physician gives the injured worker a qualified work release. The worker's weekly temporary partial disability compensation should be computed under K.S.A. 1979 Supp. 44-510e.²

The method of determining temporary partial weekly compensation for claimant's April 20, 1998, accident is found at K.S.A. 1997 Supp. 44-510e(a) and provides in part as follows:

Weekly compensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the difference between the average gross weekly wage that the employee **was earning** prior to such injury as provided in the workers compensation act and the amount the employee is **actually earning** after such injury in any type of employment, except that in no case shall such **weekly compensation** exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. (Emphasis added).

One of the purposes of the Workers Compensation Act is wage replacement, which is the restoration to a worker of a portion of the wage loss.³

In this case, the parties have stipulated to a pre-injury gross average weekly wage of \$618.58. Also, a wage statement has been admitted into evidence that shows claimant's actual weekly earnings for the period in question. The Appeals Board concludes the statute that sets forth the method to calculate temporary partial disability compensation is clear and unambiguous. Claimant is entitled to temporary partial disability compensation equal to 66 $\frac{2}{3}$ percent of the difference between his pre-injury gross average weekly wage of \$618.58 and his post-injury actual weekly earnings subject to the applicable maximum compensation rate.

² See Crabtree v. Beech Aircraft Corp., 5 Kan. App. 2d 440, 444, 618 P.2d 849 (1980).

³ See Boyd v. Barton Transfer & Storage, 2 Kan. App 2d 425, 426-428, 580 P.2d 1366, *rev. denied* 225 Kan. 843 (1978).

Respondent argues claimant is not entitled to temporary partial disability compensation if his post-injury actual weekly earnings are equal to or exceed the maximum compensation rate on the date of his accident of \$351.00 per week. Additionally, respondent argues, if claimant is entitled to temporary partial disability compensation, claimant's pre-injury gross average weekly wage should be reduced by 10 percent because respondent is only required to return claimant to work at 90 percent of his pre-injury gross average weekly wage. Further, respondent asserts its stipulation to the \$618.58 pre-injury gross average weekly wage should be withdrawn, if vacation pay is not included in claimant's post-injury actual weekly earnings.

The Appeals Board disagrees with the respondent's arguments. First, as found above, although claimant's actual earnings are equal to or exceed the \$351 maximum weekly compensation rate, claimant remains entitled to temporary partial disability compensation. The \$351 maximum compensation rate limit applies to the weekly amount obtained when 66 $\frac{2}{3}$ percent is multiplied by the difference between claimant's pre-injury gross average weekly wage and his post-injury actual weekly earnings. Second, the Appeals Board finds the 90 percent rule as argued by the respondent, only applies to the issue of whether claimant is entitled to permanent partial disability benefits based on a work disability or a functional impairment. This rule does not apply to claimant's entitlement to temporary partial disability benefits. Finally, the Appeals Board denies respondent's request to withdraw its stipulation to the \$618.58 pre-injury gross average weekly wage. Respondent was required to raise that issue before the Administrative Law Judge and failed to do so. On appeal, the Appeals Board review is limited to questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented and introduced before the administrative law judge.⁴

The Appeals Board also finds claimant received a vacation payment in the sum of \$900 for the pay period ending January 17, 1999. That payment was for vacation earned and not taken or paid in lieu of actually taking vacation. Thus, the Appeals Board finds the payment is not actual earnings and should not be included in claimant's earnings for that pay period.

Claimant argued, before the Administrative Law Judge, that the total amount of temporary partial disability owed was the sum of \$5,487.01. On appeal, the claimant submitted argument for a sum of \$5,161.72 in one place in his letter brief and a sum of \$5,174.51 in the conclusion of his letter brief. Respondent, on the other hand, argued the Administrative Law Judge's award of \$499.11 should be affirmed. In the alternative, respondent argued claimant's entitlement to temporary partial disability compensation should be the sum of \$2,817.47 or, at the most, the sum of \$3,199.24.

⁴See K.S.A. 1999 Supp. 44-555c(a).

Based on the wage statement admitted into the record, the Appeals Board has prepared an attachment that shows the amount of claimant's actual weekly earnings commencing for the weekly pay period ending on April 26, 1998, and ending on the weekly pay period ending on March 21, 1999. This attachment is incorporated as part of this Order. The attachment does not include, for the pay period ending January 17, 1999, the \$900 paid claimant in lieu of taking vacation. Claimant's actual weekly earnings are compared to the parties' stipulated average weekly wage of \$618.58. Where there is a difference between claimant's actual weekly earnings and his pre-injury gross average weekly wage, the difference has been multiplied by 66 $\frac{2}{3}$ percent. Claimant's resulting entitlement to temporary partial disability compensation has been subjected to the \$351 maximum compensation rate. As shown by the attachment, the Appeals Board concludes the claimant is entitled to an award for temporary partial disability compensation in the sum of \$5,337.39.

The parties stipulated claimant was entitled to a 10 percent permanent partial general disability award. Furthermore, the parties agreed, if any temporary partial disability compensation was awarded, those temporary partial disability weeks would be converted to temporary total disability weeks for the purpose of calculating the award.⁵

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's September 7, 1999, Decision should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Edward Mann, and against the respondent, National Beef Packing Company, and its insurance carrier, Wausau Insurance Companies, for an accidental injury sustained on April 20, 1998, and based upon an average weekly wage of \$618.58.

Claimant is entitled to 15.21 weeks of temporary total disability compensation at the rate of \$351.00 per week, or \$5,338.71,⁶ followed by 41.48 weeks of permanent partial disability compensation at the rate of \$351 per week or \$14,559.48 for a 10% permanent partial general disability, making a total award of \$19,898.19, which is all due and owing and is ordered paid one lump sum, less any amount previously paid.

Respondent is ordered to pay all authorized medical expenses.

⁵ See Richardson v. Wichita Arms, Inc., WCAB Docket No. 176,396 (August 1994).

⁶ The actual amount of temporary partial disability awarded is \$5,337.39. But, when the temporary partial disability award is converted to temporary total disability weeks, the amount rounds off to \$5,338.71.

Claimant is entitled to unauthorized medical expenses up to the statutory maximum upon proper presentation of a medical statement.

The Appeals Board also approves and adopts all other orders contained in the Decision that are not inconsistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Shirla R. McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director

ATTACHMENT 1 - TPD Calculations
4/26/98 thru 3/21/99

	Week Ending	Regular Wages	Overtime Wages	Holiday Wages	Total Wages	Loss	TPD Due
1	4/26/1998	108.23	0.00		108.23	510.35	340.25
2	5/3/1998	330.23	0.00	0.00	330.23	288.35	192.24
3	5/10/1998	444.00	158.41		602.41	16.17	10.78
4	5/17/1998	444.00	133.50		577.50	41.08	27.39
5	5/24/1998	444.00	133.50		577.50	41.08	27.39
6	5/31/1998	444.00	399.98	133.20	977.18	0.00	0.00
7	6/7/1998	444.00	91.81		535.81	82.77	55.18
8	6/14/1998	444.00	100.13		544.13	74.45	49.64
9	6/21/1998	444.00	50.10		494.10	124.48	82.99
10	6/28/1998	444.01	137.70		581.71	36.87	24.58
11	7/5/1998	399.60	266.70	133.20	799.50	0.00	0.00
12	7/12/1998	444.00	133.50		577.50	41.08	27.39
13	7/19/1998	357.98	0.15		358.13	260.45	173.64
14	7/26/1998	382.95	0.00		382.95	235.63	157.09
15	8/2/1998	444.00	16.65		460.65	157.93	105.29
16	8/9/1998	405.15	0.00		405.15	213.43	142.29
17	8/16/1998	357.98	0.00		357.98	260.60	173.74
18	8/23/1998	405.15	0.00		405.15	213.43	142.29
19	8/30/1998	324.68	0.00		324.68	293.90	195.94
20	9/6/1998	405.15	0.00		405.15	213.43	142.29
21	9/13/1998	355.20	177.60	88.80	621.60	0.00	0.00
22	9/20/1998	402.38	0.00		402.38	216.20	144.14
23	9/27/1998	421.80	0.00		421.80	196.78	131.19
24	10/4/1998	444.01	4.16		448.17	170.41	113.61
25	10/11/1998	444.00	0.00		444.00	174.58	116.39
26	10/18/1998	444.00	8.33		452.33	166.25	110.84
27	10/25/1998	444.01	4.16		448.17	170.41	113.61
28	11/1/1998	444.01	12.48		456.49	162.09	108.07
29	11/8/1998	435.68	0.00		435.68	182.90	121.94
30	11/15/1998	444.00	141.53		585.53	33.05	22.03
31	11/22/1998	349.65	177.60	133.20	660.45	0.00	0.00
32	11/29/1998	399.60	66.60	133.20	599.40	19.18	12.79
33	12/6/1998	430.13	0.00		430.13	188.45	125.64
34	12/13/1998	444.00	0.00		444.00	174.58	116.39
35	12/20/1998	427.35	124.88		552.23	66.35	44.24
36	12/27/1998	168.75	0.00		168.75	449.83	299.90
37	1/3/1999	337.50	0.00	90.00	427.50	191.08	127.39
38	1/10/1999	421.88	0.00		421.88	196.70	131.14

	Week Ending	Regular Wages	Overtime Wages	Holiday Wages	Total Wages	Loss	TPD Due
39	1/17/1999	421.88	0.00		421.88	196.70	131.14
40	1/24/1999	421.88	0.00		421.88	196.70	131.14
41	1/31/1999	421.88	0.00		421.88	196.70	131.14
42	2/7/1999	337.50	0.00		337.50	281.08	187.40
43	2/14/1999	419.06	0.00		419.06	199.52	133.02
44	2/21/1999	424.69	0.00		424.69	193.89	129.27
45	2/28/1999	421.88	0.00		421.88	196.70	131.14
46	3/7/1999	416.25	0.00		416.25	202.33	134.89
47	3/14/1999	337.50	0.00		337.50	281.08	187.40
48	3/21/1999	421.88	0.00		421.88	196.70	131.14
	TOTALS	19219.46	2339.47	711.60	22270.53	8005.72	5337.39